



1 Court.

2 Defendants have since filed a Motion to Dismiss (ECF No. 10), contending that none of  
3 Plaintiff's causes of action properly state a claim upon which relief can be granted.

## 4 **II. LEGAL STANDARD**

5 Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the  
6 claim showing that the pleader is entitled to relief" in order to "give the defendant fair notice of  
7 what the . . . claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47  
8 (1957). Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of  
9 action that fails to state a claim upon which relief can be granted. A motion to dismiss under  
10 Rule 12(b)(6) tests the complaint's sufficiency. *See North Star Int'l. v. Arizona Corp. Comm'n.*,  
11 720 F.2d 578, 581 (9th Cir. 1983). When considering a motion to dismiss under Rule 12(b)(6)  
12 for failure to state a claim, dismissal is appropriate only when the complaint does not give the  
13 defendant fair notice of a legally cognizable claim and the grounds on which it rests. *See Bell*  
14 *Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In considering whether the complaint is  
15 sufficient to state a claim, the Court will take all material allegations as true and construe them  
16 in the light most favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898  
17 (9th Cir. 1986). The Court, however, is not required to accept as true allegations that are  
18 merely conclusory, unwarranted deductions of fact, or unreasonable inferences. *See Sprewell v.*  
19 *Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). A formulaic recitation of a cause of  
20 action with conclusory allegations is not sufficient; a plaintiff must plead facts showing that a  
21 violation is plausible, not just possible. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing  
22 *Twombly*, 550 U.S. at 555).

## 23 **III. DISCUSSION**

### 24 **A. Misrepresentation and Fraud by Omission**

25 Misrepresentation is a form of fraud in which a false representation is relied upon by the

1 injured party. *Pacific Maxon, Inc. v. Wilson*, 619 P.2d 816, 871 (Nev. 1980). Misrepresentation  
2 and all other fraud claims must be pleaded with particularity pursuant to Federal Rule of Civil  
3 Procedure 9(b). In order to plead fraud with particularity, a plaintiff must plead “the time,  
4 place, and specific content of the false representations, as well as the identities of the parties to  
5 the misrepresentations.” *Swartz v. KPMG, LLP*, 476 F.3d 756, 764 (9th Cir. 2007).

6 Here, Plaintiff pleads generalized grievances concerning the lending practices of  
7 Defendants, lumping all five Defendants together under the title “Defendants” when referring  
8 to them. Specific times and places relevant to specific false representations are not pleaded, nor  
9 does Plaintiff specify the identities of the particular parties making the false representations.  
10 Thus, this claim does not meet the Rule 9(b) particularity requirement and will be dismissed  
11 with leave to amend.

#### 12 **B. Contractual Breach of the Duty of Good Faith and Fair Dealing**

13 Plaintiff alleges that Defendants breached their duty of good faith and fair dealing “by  
14 engaging in predatory, unethical, and unfair, and unsound lending practices.” (Compl. ¶ 62,  
15 ECF No. 1.) In Nevada, “every contract imposes upon each party a duty of good faith and fair  
16 dealing in its performance and execution.” *Robins v. Wolf Firm*, No. 2:10-cv-00424-RLH-PAL,  
17 2010 WL 2817202, at \*4 (D. Nev. July 15, 2010). However, “[a] party cannot breach the  
18 covenant of good faith and fair dealing before a contract is formed.” *Id.*

19 Like the plaintiff in *Robins*, Plaintiff only claims that Defendants’ actions *prior* to the  
20 formation of the mortgage contracts led to a breach of their duty of good faith and fair dealing.  
21 Thus, even if Plaintiff’s allegations are true, “they fail to establish that Defendants were  
22 unfaithful to the purpose of the mortgage contract after it was formed.” *Id.* Accordingly, this  
23 claim is dismissed without leave to amend, as further amendment would be futile.

#### 24 **C. Tortious Breach of the Duty of Good Faith and Fair Dealing**

25 Breach of the implied covenant of good faith and fair dealing is normally a contract

1 claim. *See A.C. Shaw Constr., Inc. v. Washoe County*, 784 P.2d 9, 9-10 (Nev. 1989). However,  
2 a claim for tortious breach of the implied covenant of good faith and fair dealing can be brought  
3 if the plaintiff can show a special reliance or fiduciary duty between the plaintiff and the  
4 defendant. *See Aluevich v. Harrah's*, 660 P.2d 986, 987 (Nev. 1983).

5 Plaintiff's claim fails because she has failed to plead a legally cognizable special  
6 reliance or fiduciary duty between herself and Defendants. Although she claims that  
7 Defendants owed her a fiduciary duty, which included ensuring that she received all required  
8 disclosures, courts in this District have repeatedly held that a lender owes no fiduciary duty to a  
9 borrower absent exceptional circumstances. *See, e.g., Hall v. MortgageIt, Inc.*, No. 2:09-cv-  
10 02233-JCM-GWF, 2011 WL 2651870, at \*2 (D. Nev. July 6, 2011). Here, Plaintiff has pleaded  
11 nothing more than typical borrower/lender and borrower/loan servicer relationships; therefore,  
12 this claim will be dismissed with leave to amend.

#### 13 **D. Civil Conspiracy**

14 In order to plead an actionable claim for civil conspiracy, a plaintiff must plead that two  
15 or more entities intended to accomplish an unlawful objective, by acting in concert, for the  
16 purpose of harming the plaintiff, and that the plaintiff was damaged as a result. *Hilton Hotels*  
17 *Corp. v. Butch Lewis Productions, Inc.*, 862 P.2d 1207, 1210 (Nev. 1993). Plaintiff contends  
18 that Defendants entered into a conspiracy "for the common purpose of accruing economic gains  
19 for themselves at the expense of the Plaintiff," (Compl. ¶ 69, ECF No. 1); however, Plaintiff  
20 provides no further information specifying how all of the various Defendants actually  
21 coordinated their activities or worked together to harm her. Accordingly, Plaintiff has failed to  
22 state a claim for conspiracy. As the court in *Robins* stated when faced with substantially  
23 identical allegations:

24 In the Court's view, [Plaintiffs'] conclusory assertion that  
25 Defendants engaged in a conspiracy in order to obtain "economic  
gains" does not state a viable claim under *Twombly* because  
[Plaintiffs'] do not indicate exactly what the conspiracy was or how

1 each individual Defendant was a part of it. Without this information,  
2 the Court has to speculate regarding the specific details of the  
3 alleged conspiracy and how it involves each Defendant.

4 *Robins*, 2010 WL 2817202, at \*4. This Court agrees. Plaintiff's claim is dismissed with leave  
5 to amend.

6 **E. Civil RICO and Racketeering**

7 Plaintiff claims that Defendants engaged in racketeering activity intended "to perpetuate  
8 fraud upon the Plaintiff through the use of intentional nondisclosure, material  
9 misrepresentation, and creation of fraudulent loan documents." (Compl. ¶ 72, ECF No. 1.)  
10 Because Plaintiff alleges that the alleged activity was undertaken in order to defraud her, this  
11 claim must be pleaded with Rule 9(b) particularity. *Robins*, 2010 WL 2817202, at \*2.  
12 However, Plaintiff's allegations fail to comply with this pleading standard, as Plaintiff fails to  
13 specify how each Defendant participated in the alleged enterprise and when and how the  
14 enterprise was initiated. This claim will therefore be dismissed with leave to amend.

15 **F. Unjust Enrichment**

16 Without providing any supporting facts or arguments, Plaintiff claims that "Defendants  
17 have been unjustly enriched by their illegal and fraudulent actions." (Compl. ¶ 75, ECF No. 1.)  
18 However, even if Plaintiff had pleaded facts sufficient to support an unjust enrichment claim, a  
19 claim for unjust enrichment cannot stand when, as here, there are express, written contracts--  
20 such as the deeds of trust and promissory notes--that govern the relationships between the  
21 parties. *See Leasepartners Corp. v. Robert L. Brooks Trust*, 942 P.2d 182, 187 (Nev. 1997).  
22 Accordingly, this cause of action is dismissed without leave to amend.

23 **G. Conspiracy to Commit Fraud Related to the MERS System**

24 Plaintiff contends that "the corporate Defendants did knowingly conspire to engage in a  
25 scheme to promote, encourage, and facilitate fraudulent and predatory lending and foreclosure

1 practices which eroded the national real estate market, including the Nevada real estate  
2 market.” (Compl. ¶ 77, ECF No. 1.) However, Plaintiff fails to plead this claim with the  
3 particularity required by Rule 9(b). *See Anderson v. Deutsche Bank Nat’l Trust Co.*, No. 2:10-  
4 cv-01443-JCM-PAL, 2010 WL 4386958, at \*4 (D. Nev. Oct. 29, 2010) (“To allege a  
5 conspiracy to defraud, a complaint must meet the particularity requirements of Federal Rule of  
6 Civil Procedure 9(b) and inform each defendant of its actions that constituted joining the  
7 conspiracy.”). Plaintiff fails to plead with particularity the time, place, and content of the  
8 alleged fraudulent activities, and also fails to plead which Defendants are responsible for which  
9 acts. Accordingly, this claim must be dismissed with leave to amend.

#### 10 **H. Fraud**

11 As explained above, fraud claims must be pleaded with particularity. Here, Plaintiff  
12 pleads that Defendants obtained her signature by false pretenses, but again lumps all five  
13 Defendants together under the title “Defendants” when referring to them. Specific times and  
14 places relevant to specific instance of false statements are not pleaded, nor does Plaintiff  
15 specify the identities of the particular parties operating under false pretenses. Thus, this claim  
16 will be dismissed with leave to amend.

#### 17 **I. Quiet Title**

18 An action for quiet title is an equitable proceeding in which a party seeks to settle a  
19 dispute over ownership of property or to remove a cloud upon her title to the property.  
20 *Anderson v. Deutsche Bank National Trust Co.*, No. 2:10-cv-01443-JCM-PAL, 2010 WL  
21 4386958, at \*5 (D. Nev. Oct. 29, 2010). In Nevada, a widely accepted rule in such actions is  
22 that the party must tender the undisputed amount due and owing in order to challenge the  
23 validity of the foreclosure sale. *Id.* In essence, she who seeks equity must do equity. *Id.*  
24 Because Plaintiff has not indicated that she tendered the full amount owing under the notes, this  
25 claim is dismissed with leave to amend.

1           **J.     Injunctive & Declaratory Relief**

2           As all of Plaintiff's substantive claims have been dismissed, she is not entitled to  
3 Injunctive or Declaratory Relief.

4                               **CONCLUSION**

5           **IT IS HEREBY ORDERED** that Defendants' Motion to Dismiss (ECF No. 10) is  
6 **GRANTED**. Plaintiff's claims for Unjust Enrichment and Contractual Breach of the Duty of  
7 Good Faith and Fair Dealing are **DISMISSED without leave to amend**. All of Plaintiff's  
8 other causes of action are **DISMISSED with leave to amend**. Plaintiff may file an Amended  
9 Complaint correcting the deficiencies in the current Complaint by August 4, 2011. This is a  
10 firm date and no extensions will be given. Failure to file an Amended Complaint by that date  
11 will result in the dismissal of this lawsuit with prejudice.

12           DATED this 22nd day of July, 2011.

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Gloria M. Navarro  
United States District Judge  
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